

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 12-43

March 20, 2012

To: All Regional Directors, Officers-in-Charge,
and Resident Officers

From: Anne Purcell, Associate General Counsel

Subject: Additional Guidance Concerning *Collyer* Deferral in Cases Involving
8(a)(3) or 8(a)(1) Discriminatees

This memorandum provides additional guidance on several issues regarding implementation of GC Memorandum 12-01, which altered the procedure for processing cases eligible for *Collyer* deferral that involve Section 8(a)(3) or 8(a)(1) discriminatees.¹ Specifically, this memorandum addresses (1) the applicability of GC12-01 to independent 8(a)(1) violations; (2) a slight change in the language in the *Collyer* letter; (3) the process for sending out the show cause letter and handling the responses; (4) the evidence that should be sought to determine if a matter will likely be deferred for more than one year; (5) Section 8(a)(5) cases implicating individual Section 7 rights; and (6) how to define the one year period referenced in GC12-01.

(1) Applicability of GC 12-01 to Independent 8(a)(1) violations

The purpose of GC 12-01 is to place greater emphasis on enforcing individual statutory rights and redressing individual harms. Thus, the reference to “Section 8(a)(1) and (3) cases would include Section 8(a)(1) cases involving discipline for protected concerted activity unrelated to union activity but would not include other Section 8(a)(1) violations.

(2) Change in Language of the *Collyer* Letter

GC Memorandum 12-01 states that after a charge has been deferred for one year, the Region should send a “show cause” letter to all parties and that if the Charging Party does not respond to that letter, the Region should *not* dismiss for failure to prosecute without contacting the Charging Party and any individual discriminatees to ensure they understand that the case is subject to dismissal absent some response.

Potentially this procedure is inconsistent with the statement in the current *Collyer* letter which says that if the Charging Party either fails to promptly submit the grievance to the grievance/arbitration process or declines to have the grievance arbitrated if it is not resolved, the charge “will” be dismissed.

¹ The principles set forth in Memorandum GC 12-01 are equally applicable to cases eligible for deferral pursuant to Dubo Mfg. Corp., 142 NLRB 431.

Since under the revised procedure the charge will not automatically be dismissed if the discriminatee wishes for the charge to proceed, the language that the charge “will” be dismissed should be changed to reflect that the charge “may” be dismissed. The language in the *Collyer D* letter regarding the Charging Party’s Obligation will now read as follows:

Charging Party’s Obligation: Under the Board’s *Collyer* deferral policy, the Charging Party has an affirmative obligation to file a grievance, if a grievance has not already been filed. If the Charging Party fails either to promptly submit the grievance to the grievance/arbitration process or declines to have the grievance arbitrated if it is not resolved, I may dismiss the charge.

This change has been made in the NxGen *Collyer D* Letter template.

(3) **“Show Cause Letter” and Responses**

A “show cause letter” has been created to send to the parties after a case with Section 8(a)(1) or (3) discriminatees has been deferred for one year. The NxGen template is available under the Document Type DEF and the Document Subtype Deferral Status Check - 1 year. The template name is Show Cause Letter - 1 year. A copy of this letter is attached.

The letter requires each party to state its position regarding continued deferral. If the Charging Party does not respond to the letter, the Region should contact the Charging Party and specifically inform it that failure to respond within 7 additional days, or such other time as may be reasonable under the circumstances, may result in dismissal of the charge. The Region should also contact any individual discriminatees and advise them that if they do not take a position on whether processing of the charge should be resumed, the charge may be dismissed. If possible, the contact with the discriminatee should be in writing and the discriminatee should normally be given 14 days to respond, preferably in writing.²

If a charging party union fails to respond but the discriminatee(s) responds and asks that processing of the charge resume, the Region should revoke deferral of the charge and resume processing of the charge unless there is a good reason to continue deferral or for dismissal. If neither the Charging Party nor the discriminatees respond after being notified that the charge may be dismissed, the charge may be dismissed.

(4) **Evidence to Determine If a Grievance Will Likely Deferred for More Than One Year**

Questions have been raised about the type of evidence that should be gathered during the investigation to determine if a grievance regarding 8(a)(1) or 8(a)(3)

² If the individual fails to respond to a written request for a position, the Region should attempt to contact the individual by telephone.

discrimination will likely be deferred for more than a year. The investigation should include information about (1) the history of arbitration between the parties and the length of time it usually takes to get to arbitration; (2) the backlog of pending grievances; (3) how, if at all, grievances are prioritized between discipline, discharge, and other contract issues; and (4) the settlement rate of grievances over similar matters and the average time from filing to settlement of such grievances. No investigation is necessary, however, if the parties agree that arbitration will be completed within one year.

(5) Section 8(a)(5) Cases

As noted in Memorandum GC 12-01, some Section 8(a)(5) charges can implicate Section 7 rights or have as serious an economic impact on employees as a Section 8(a)(1) and (3) charge. An example of such a charge would be layoffs of employees as a result of unilateral subcontracting of bargaining unit work. After such a charge has been in deferral status for over a year, or if such a charge is very likely to be deferred for over a year, and the Regional Director, at his or her discretion, determines that to defer such a charge would frustrate the Board's remedial authority, then the Region may conduct a full investigation and submit the case to Advice.

(6) How is the "within a year" Time Period Defined?

The one year period begins to run from the date of the deferral letter. The period is complete when the arbitration hearings have concluded.

If you have any questions about this matter, please contact me or your AGC or Deputy.

/s/
A.P.

cc: NLRBU
Release to the Public

Deferral Status Check Show Cause Letter –1 Year

Regional Office letterhead

[Date issued]

Charging Party Legal Rep (or Charging Party if
no legal rep) Name and Address
Charged Party Legal Rep (or Charged Party if no
legal rep) Name and Address
Union Legal Rep (or Union Rep) Name and
Address (if charge filed by Individual)

Re: [Case name]
Case [Case number]

Salutation:

On [date deferral letter issued], the above matter was deferred pending resolution of the underlying dispute in the grievance/arbitration procedure. The matter has now been deferred for more than one year.

Position on Whether Deferral Should Be Revoked: Each party to this case is hereby requested to provide its position in writing by no later than **[14 days from date letter issues]** on whether, given the length of the deferral period, the deferral should be revoked and the case fully investigated. If there is a good reason for continued deferral, such as imminent arbitration of the matter, you should so state. You are encouraged, but not required, to e-file your position by going to the Agency's website at www.nlr.gov, clicking on **File Case Documents**, entering the NLRB Case Number, and following the detailed instructions.

If you have any questions concerning this matter, please contact [agent name], at [agent phone].

Very truly yours,

[RD name]
Regional Director